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No. 325

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM EVANS, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW.

The opinion of the Court of Appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1958 (Pet. App. B), and a petition for a rehearing was denied on August 4, 1958. The petition for a writ of certiorari was filed on August 29, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports petitioner's conviction for concealing marihuana.

STATEMENT

Petitioner and the co-defendant, Josephine Evans, were jointly charged in a four-count indictment with concealment of heroin (count 1), selling heroin (count 2), concealing and facilitating the transportation of 22 grains of marihuana without having paid the transfer tax (count 3), and conspiring to sell, disperse and distribute quantities of narcotic drugs (count 4) (R. 3-6). After a trial before the district court, sitting without a jury, petitioner was found guilty under all counts (R. 6-9), and co-defendant Josephine Evans under counts 1, 2 and 4 (R. 220-221). On appeal, the Court of Appeals affirmed petitioner's conviction under count 3 relating to marihuana, but reversed as to the other counts for insufficiency of the evidence[1] (Pet. App. A and B). Petitioner was sentenced to ten years imprisonment and fined $1,000 under count 3 (R. 8).

The evidence in support of petitioner's conviction under count 3 (marihuana) may be summarized as follows:

Petitioner and the co-defendant, Josephine Evans, were the joint operators of Oliver's Restaurant at 1569 Ellis Street, San Francisco, California. Although petitioner and Josephine Evans had lived together intermittently since 1950 or 1951, she maintained a separate residence at 181 Thrift Street in San Francisco (R. 65, 161, 176-178). Petitioner resided in a room above Oliver's Restaurant, but, according to his own testimony, he stayed overnight on some occasions with Mildred Moore at 953 Broderick Street, San Francisco,

[1] The Court of Appeals affirmed Josephine Evans' conviction under counts 1 and 2, but reversed her conviction under the conspiracy count, count 4. She does not join in the petition for a writ of certiorari.

and he was admittedly the father of her child (R. 176-177).

On March 5, 1957, at about 4:10 to 4:20 a.m., agents of the United States Bureau of Narcotics, armed with an arrest warrant, went to the second floor flat at 953 Broderick Street and there arrested petitioner (R. 126-130, 153). At the time of his arrest, petitioner was attired only in his underwear. According to his own testimony, he had just arrived at the apartment, five minutes after closing the restaurant at 4:00 a.m., and was undressing (R. 183). Besides petitioner, a woman and two small children were in the apartment. The woman, who subsequently proved to be Mildred Moore, identified herself as petitioner's wife, "Mildred Evans," and the children as belonging to herself and petitioner (R. 142, 144, 153; and see R. 128). A search of the premises incident to the arrest revealed 22 grains of what proved to be marihuana concealed behind the carpet on the top step of the inside stairs[2] (R. 133-135, 217-218). Agent Pirziborowski then walked over to petitioner, who was sitting in the living room of the second floor apartment, and the following conversation ensued (R. 135-136):

Q. What is that?
A. What is what?
Q. It looks like marihuana to me.
A. Is it mine?
Q. I don't know.

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[2] The building consists of two "flats", 943 and 953, both of which are reached through a common doorway from the street and by climbing approximately 12 stairs to a landing. The flats are reached through separate doors. After entering the door to 953, it is necessary to travel up a flight of 30 more stairs to the living quarters (R. 213-215).

A. Where did you find it?

Q. I found it in the house by the top riser of the carpet.

A. Well, then, will my answer make any difference as far as you obtaining a conviction in this case?

Q. It might.

A. Well, I will try to figure out what you have against me first before I answer that.

Agent Yannello testified as to this same conversation (R. 134), stating that petitioner was "fencing" with the officers in his conversation, and neither affirmed nor denied possession (R. 219). Mildred Moore, on the other hand, denied ownership of the marihuana (R. 143, 154). Before leaving the dwelling, the officers told both petitioner and Mildred Moore to get dressed as the officers "were going down to book them". Petitioner then asked, "Well, what are you going to book her for?", and Agent Przibórowski replied, "For the marihuana, joint possession". Petitioner then said, "Well, you don't want to book her for that" (R. 136).[3]

Later, that morning, the officers had a further discussion with petitioner concerning the narcotics traffic.

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[3] On the trial, the arresting officer, Agent Przibórowski, was questioned on *voir dire* and testified that, prior to obtaining the warrant of arrest, petitioner had been under surveillance for a period of time and was seen to go to the Broderick Street address; that petitioner had had conversations with an "informer" from the Narcotics Office who had driven him to that address after these conversations; and that on other occasions the informer had ordered narcotics from petitioner which had been delivered by the co-defendant, Josephine Evans (R. 131). After the court had ruled that the arrest under warrant and the search were on the basis of probable cause, the government presented its evidence in support of the third count of the indictment.

Although he made no confession of participation in the crime for which he was arrested, petitioner readily discussed his knowledge of narcotics sources. Thus, according to the agents' testimony (R. 138; see also R. 155-156), petitioner boasted, "There is no connection in the United States, there is no person in the United States in narcotics that I consider too big but what I couldn't buy narcotics from them if I wanted to."

Petitioner, in his own defense, testified that he was the father of Mildred Moore's child, and that, although he spent the night with her from time to time, he did not live with her, but in the residential quarters over Oliver's Restaurant (R. 176-177). He admitted on cross-examination that he had used the name "Mildred Evans" in purchasing a 1957 Chrysler automobile for her, but stated that Mildred Moore was her real name (R. 191). Petitioner admitted that he had been an addict and had twice previously been convicted of federal narcotics violations.[4]

Mildred Moore testified that she had paid the rent at 953 Broderick and that, although petitioner had visited her once or twice a week, he did not spend the night when he came (R. 196, 198).

After the petitioner had moved for a jugdment of acquittal and argument was had on the issue of the sufficiency of the evidence (R. 208-209, 220-221), the district court found petitioner guilty on all counts.

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[4] Petitioner was convicted in the Northern District of Illinois on one occasion for possessing 17 caps of cocaine and 10 or 12 caps of heroin, and on another occasion he pleaded guilty in the Eastern District of Michigan to the charge of selling two capsules of heroin (R. 190).

ARGUMENT

Petitioner's challenge to the sufficiency of the evidence to support his conviction under count 3 for concealing 22 grains of marihuana, upheld by both courts below, presents no issue for review by this Court. See *United States* v. *Johnson*, 319 U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586, 589-590.

The facts summarized in the Statement, *supra*, amply support an inference that petitioner was in possession of the narcotics which were found by the arresting officers. As the court below held (Pet. App., p. xiv), the fact of possession may be proved by circumstantial evidence. *United States* v. *Pinna*, 229 F. 2d 216, 218 (C.A. 7). The inferences to be drawn from the evidence are for the trier of fact, not for the reviewing courts. *Holland* v. *United States*, 348 U.S. 121, 140.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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